

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RONALD L. JONES
Claimant

VS.

HAHNER, FOREMAN & HARNESS, INC.
Respondent

AND

BUILDERS ASSOC. SELF INS. FUND OF KS
Insurance Carrier

Docket No. 1,017,137

ORDER

Respondent and its insurance carrier (respondent) request review of the April 6, 2005 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on September 7, 2005.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Wade A. Dorothy, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that claimant did not provide the required notice within the 10 day period set forth in K.S.A. 44-520, and that the compensability of this claim turns upon the issue of "just cause" as that term is used in the statute. The parties further agreed that if this claim is compensable, the 15 percent permanent impairment to the whole body awarded by the ALJ is appropriate.

ISSUES

The ALJ concluded that it was "more probable than not that the [c]laimant's back injuries, requiring a three week hospital stay, were caused by the heavy physical labor that he was doing the week of April 23, and not from sleeping wrong one night in his son's bed."¹ He went on to find that claimant's subsequent confinement in the hospital was "just cause" for claimant to delay giving respondent notice of his injury. Thus, under K.S.A. 44-520, his delay was justified. Accordingly, claimant was awarded 15 percent functional impairment to the whole body. The ALJ, however, denied claimant's request for temporary total disability compensation (ttd) from April 24, 2004 to September 3, 2004 for lack of evidence. Claimant was nevertheless awarded 8 weeks of ttd previously ordered following a preliminary hearing.

The respondent requests review of the Award alleging claimant failed to meet his burden of proving he suffered personal injury by accident arising out of and in the course of his employment. Respondent also contends claimant failed to provide timely notice regarding the occurrence of his accident as required by K.S.A. 44-520. Specifically, that claimant failed to establish "just cause" for his delay in notifying respondent of his alleged work-related injury. Thus, respondent requests the Board reverse the ALJ's Award and deny claimant compensation.

Claimant argues that he provided written notice of his injury on May 19, 2004 and although this notice was not within 10 days of his injury, once he realized his back was seriously hurt from work activities he provided notice as soon as he was able. Moreover, claimant maintains he was not aware of the respondent's requirements to report an injury. For these reasons, claimant contends he has established "just cause" for his delayed notice and is entitled to the 15 percent impairment awarded by the ALJ.

The issues to be addressed in this appeal are as follows:

1. Whether claimant sustained personal injury arising out of and in the course of his employment with respondent;
2. Whether claimant established "just cause" for his delay in reporting his injury as that term is used in K.S.A. 44-520; and
3. Whether claimant is entitled to ttd benefits from April 26, 2004 to July 20, 2004.

¹ ALJ Award (Apr. 6, 2005) at 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

This is the second time this claim has been before the Board. Following an initial preliminary hearing, this matter was appealed to Board. The ALJ awarded claimant preliminary benefits after concluding claimant suffered personal injury by accident on April 23, 2004 and that claimant's accident arose out of and in the course of his employment with respondent.

On appeal to the Board, the facts surrounding the claim were summarized as follows:

Claimant worked for respondent doing construction and remodeling of QuikTrips. His recollection of how long he was employed by respondent before April 23, 2004 is vague, answering "four, five, six weeks, might have been two weeks, I don't - - something like that."²

Claimant alleges he injured his "[l]ow back, left back and left arm" by "[j]ackhammering & lifting" on April 23, 2004.³ At the July 20, 2004 preliminary hearing, counsel for claimant stated the alleged accident date was "[o]n or about April 23, '04."⁴ Claimant testified that his back pain began on Wednesday and worsened Thursday and Friday until it got to the point where he could not continue working. At about 1:30 p.m. claimant told his supervisor, Robert (Bob) Dick that he needed to go to the hospital. Claimant left work early on Friday, April 23, and went to the emergency room at Via Christi Regional Medical Center. Claimant was given pain medication and released that same day. Claimant has not worked since April 23, 2004.

On April 28, 2004 claimant returned to Via Christi "because I couldn't deal with it, my back hurt so bad."⁵ Whereupon claimant was admitted to the hospital and remained there for three weeks. After claimant was released he continued receiving physical therapy on an outpatient basis.

. . .

²*Id.* at 6.

³K-WC E-1 Application for Hearing (filed June 2, 2004).

⁴P.H. Trans. at 3.

⁵*Id.* at 9.

Claimant acknowledges that he did not tell his supervisor that his back problems were work-related nor did he request medical treatment from respondent. In fact, claimant admits that at no time before his attorney sent a letter dated May 19, 2004 to respondent did he tell anyone that he hurt his back at work.

When asked why he didn't tell anyone that he hurt his back at work, claimant answered that he did not think he was hurt that bad and would quickly recover.

Q. (Mr. Lee) Is the reason that you didn't tell them that you hurt your back at work or that you wanted medical treatment provided through Hahner, Foreman & Harness was because you didn't know that you had hurt your back at work?

A. (Mr. Jones) Well, I didn't know that it was that bad, I mean, I didn't know it - - I had no idea that I was going to be in the hospital for three weeks, I just thought that I'd - - I would get me some pills. Because, I mean, I woke up with backaches before and they just went away, so I didn't think I was going to be in no hospital for another three weeks.⁶

Claimant's supervisor, Robert Dick, testified that claimant starting working for respondent "approximately two to three weeks before the day that he had to take off work because he was hurt."⁷ On Friday, April 23, 2004, claimant left work early because his back was hurting him and he could not work anymore. Claimant had not complained to Mr. Dick about his back before that date. Claimant did not say what had caused his back problem and did not ask to be sent to a doctor. The following Monday claimant left a message on Mr. Dick's phone that his back was still hurting and that he would not be at work that day. The next day, Tuesday, Mr. Dick said that claimant called and told him that his back was still hurting him and he could not work. That was the last conversation Mr. Dick had with claimant. At no time did claimant say that his back problem was work-related nor did he request medical treatment from respondent.

Claimant could not recall whether or not he spoke with Mr. Dick after he left work on Friday, April 23. Claimant had his mother deliver an off work slip from his doctor. Mr. Dick said claimant's mother made no mention of his condition being work-related at that time. This was probably the April 27, 2004 work release signed by Dr. John McMaster.⁸ That release form refers to "[l]ow back pain/strain" but makes no mention of it being work-related.

Claimant explains his delay in reporting his back injury to his employer as work-related because he did not think it was serious. This explanation does not fit with claimant's description of his pain as being unlike anything

⁶*Id.* at 16.

⁷*Id.* at 19.

⁸ P.H. Trans., Resp. Ex. 1.

he had ever experienced before. The pain also caused him such discomfort that he could not work nor even stand up straight. By the time of his second visit to the emergency room claimant was unable to raise his arms. Moreover, not only had claimant been to the emergency room twice within a week of his injury, but also had x-rays which were suggestive of a compression fracture in his spine at the T11 level which was confirmed by a CT scan on April 29, 2004. The CT scan also revealed stenosis and disc bulges at L3-4 and L4-5 intervertebral disc levels.⁹ (Emphasis added)

Upon presentation of the appeal, the Board considered the parties' arguments, the evidence and the ALJ's preliminary hearing Order and reversed, concluding that -

The record does not contain persuasive evidence establishing just cause for claimant failing to report the accident within the 10-day period contained in K.S.A. 44-520. As such, the time for giving respondent notice of accident cannot be extended to 75 days for just cause. Therefore, the May 19, 2004 letter from claimant's counsel does not satisfy the statutory notice requirement.¹⁰

Accordingly, the ALJ's preliminary hearing Order was reversed. Thereafter, the claim was tried at a regular hearing on January 26, 2005.

The only additional evidence offered by the parties was the claimant's regular hearing testimony and some exhibits that were stipulated into evidence. During the regular hearing, claimant testified that he recalled no wall placard or anything else that informed him of the procedure to follow if injured at work.¹¹ This statement is called into question as one of the documents the parties stipulated into evidence is an employee acknowledgment which claimant signed on April 7, 2004. This acknowledgment sets forth the procedure to follow in the event of an injury. Although claimant's counsel indicates in his submission letter that it is uncontroverted that the claimant did not read this document, this appears to be inaccurate. The record indicates the claimant simply does not recall any directives. While he may not recall signing this document, the Board could find no testimony within the record that claimant did not read it. In any event, the Board does not find claimant's lack of recollection to be determinative. Rather, it is only one of many factors to consider when deciding whether "just cause" is shown for purposes of K.S.A. 44-520.

K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within ten (10) days of the date of the accident. The notice must state the

⁹ Board Order (Oct. 29, 2004) at 2-4.

¹⁰ *Id.* at 4.

¹¹ R.H. Trans. at 10.

time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim.¹² That same statute permits the reporting period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether "just cause" exists are:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

This is not a case that necessarily turns solely upon credibility. Rather, the outcome of this case is dependent upon the evidence and whether the facts establish "just cause" for claimant's delayed notification. When the ALJ considered whether "just cause" was established, he was persuaded (at both the preliminary hearing and regular hearing) that claimant's 3 week hospital stay justified his delay in notifying respondent of his injury. The Board remains unpersuaded.

Claimant steadfastly maintains that he was not aware he had an accident at work. Yet, his actions are at odds with that statement. At the preliminary hearing claimant explained that he had been jackhammering *at work* and his back pain began on Wednesday and by Friday, it was intolerable. He went on to explain that he did not know how seriously he was hurt until after he was hospitalized.

Furthermore, if claimant truly did not know he had sustained an accident as of April 23, 2004, there is nothing in the record to indicate what caused claimant later to realize that his back condition was related to an accident at work. The evidence contained within the record certainly suggests that claimant was specifically advised shortly after being hired of the requirement to report a work-related accident, yet he failed to do so within the 10 day period. And although the claim is pled as having occurred on a single date, the testimony suggests that it developed progressively over a period of a few days. Nevertheless, the symptoms were severe and claimant was acutely aware of his problem. He even described it at his preliminary hearing as worsening while at work, but he failed to mention this to his supervisor or any of the emergency room personnel.

¹² See e.g., *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

Given this evidence and the lack of any plausible explanation as to why claimant concluded his injury was work-related only after he left the hospital, the majority of the Board does not believe the record supports a finding of "just cause" and therefore, the May 19, 2004 notice of injury is insufficient. The ALJ's Award of 15 percent permanent partial impairment is, therefore, reversed. The balance of the issues presented on appeal are rendered moot.

Respondent is nevertheless responsible for the fees assessed within the ALJ's Award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated April 6, 2005, is reversed and set aside. Claimant is not entitled to an Award against respondent as he failed to timely notify respondent of his injury as required by K.S.A. 44-520.

The ALJ's assessment of fees against respondent is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We the undersigned Board Members respectfully dissent from the majority's opinion and would affirm the ALJ's Award, albeit for a different reasoning. We would find that

respondent had actual notice of claimant's accident as of Friday, April 23, 2004, in that claimant was obviously injured while in respondent's employ. The nature of claimant's work, jackhammering, and the immediate onset of his physical complaints coupled with the fact that he was unable to stand up straight on Friday, 23, 2004, his last day of work and required immediate medical attention, does, in this member's view, constitute actual notice of a work-related injury or aggravation.

Independent of that finding, the undersigned would also find there is just cause for claimant's failure to provide notice thus extending the period in which to give notice to 75 days.

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director